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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1071

CHARLES FARMER,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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No.

CHARLES FARMER,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, Charles Farmer, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above case on November 21, 1966.

Opinions Below

The opinions of the Supreme Court of New Jersey, printed in the appendix herein, *infra*, pp. 1a-50a are reported in 45 N. J. 520 (1965) and 48 N. J. 145 (1966).

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on November 21, 1966 (App. 51a). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. §1257 (3).

Questions Presented

1. Is the Fifth Amendment's prohibition against placing an accused in double jeopardy applicable in state court prosecutions under the Due Process Clause of the Fourteenth Amendment?

2. Was petitioner placed in double jeopardy when the trial court declared a mistrial after the jury had been impaneled and testimony taken where the prosecuting attorney's failure to carry out the order of the court below was the producing cause of the mistrial?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION — Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION — Fourteenth Amendment

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due proceses of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW JERSEY CONSTITUTION, 1947 — Article I, Paragraph 11

> "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

Statement of the Case

On November 15, 1963, the Grand Jury of Middlesex, County, New Jersey indicted petitioner, Charles Farmer, for first degre murder of his wife, Barbara Farmer, on September 18, 1963. After wounding himself, petitioner was taken to St. Peter's General Hospital in New Brunswick, New Jersey where he remained under treatment for some time. On February 3, 1964, following a hearing which began on January 22, 1964, the Superior Court of New Jersey, Law Division, found him mentally incompetent to stand trial and committed him to the State Hospital for the criminally insane. See *Farmer* v. *State*, 42 N. J. 579 (1964). Subsequently, on May 25, 1965, again after a hearing, the Law Division declared him mentally fit for trial.

On July 14, 1965, petitioner moved in the trial court for an order to permit pretrial discovery of the State's case. Specifically he asked leave "(a) To inspect, copy and photograph all statements, papers and confessions concerned with the within indictment; (b) To inspect and copy all those grand jury minutes concerned with the within indictment. (c) To inspect and copy all medical, psychiatric and neurological reports pertaining to the defendant. (d) To inspect and copy all ballistic reports and paraffin reports made in connection with any firearms allegedly used in connection with the death of Barbara Farmer. (e) To examine any and all firearms and instruments concerned with the within indictment. (f) To inspect, copy and photograph all photographs concerned with the within indictment. (g) To inspect and examine any clothing worn by Barbara Farmer or Charles Farmer on September 18, 1963." This request was granted by the trial court and an order was entered. Thereafter, the State of New Jersey sought leave to appeal from paragraphs (a) and (b) of the order which gave leave to the petitioner (a) to inspect, copy and photograph all statements, papers and confessions concerned with the within indictment. (b) To inspect and copy all those grand jury minutes concerned with the within indictment. The Supreme Court of New Jersey granted leave to appeal and affirmed the trial court's order. *State* v. *Farmer*, 45 N. J. 520 (1965) (App. 1a-4a). In accordance with the order for discovery, the State delivered to petitioner the grand jury testimony, statements of five witnesses and notes on interviews of approximately six other witnesses.

On January 4, 1966, trial of the indictment commenced with the impaneling of a jury. A mistrial was granted by the court with consent of the State and the petitioner, based

on conclusion that the jury panel was contaminated. On January 17, 1966, the second trial of the indictment began and two weeks were consumed before a full panel of 14 jurors was completed. Trial terminated February 3, 1966, when the trial court declared a mistrial over the strenuous objection of the petitioner (D16). The State had called two witnesses; one, a member of the local police department; the other, an indentification officer attached to the prosecutor's staff. The third witness offered by the State was Sgt. Earl Eichler of the Highland Park, New Jersey Police Department. The Sergeant testified that he found himself in the room with the decedent and the petitioner soon after the occurrence. When asked to testify as to a statement allegedly made by the petitioner, counsel for petitioner inquired of the Prosecutor whether the witness had ever given a statement to the Prosecutor's office and, if so, why a copy thereof had not been given petitioner pursuant to the order of discovery. This inquiry disclosed that the Prosecutor had not only a statement of the witness, Eichler, but had in his possession some 28 other statements allegedly made by police officials, none of which statments had been exhibited to petitioner. The State represented that it intended to call as witnesses the makers of such statements.

After a recess was taken, the trial judge declared that he was satisfied that the failure of the State to submit the reports to the petitioner was the result of a misinterpretation of the discovery order and not a deliberate attempt to deny petitioner the information contained therein. The trial court thereupon granted a mistrial over the objections of both defendant and the State. Thereafter, petitioner moved for a dismissal of the indictment on the ground that a new trial would place him in double jeopardy in violation of the Fifth Amendment to the United States

Constitution, and of Article I, paragraph 11 of the New Jersey Constitution. The motion was denied in an unreported opinion (D13) in which the trial judge reiterated his opinion that the prosecutor had acted in good faith in interpreting the discovery order. The trial judge also declared that even though the prosecutor's interpretation was erroneous and must bear the entire responsibility for the situation resulting in the need for the mistrial, under all the circumstances of the case, it would not be fundamentally unfair to require retrial of the defendant. The Supreme Court of New Jersey affirmed the order of the trial court and held that defendant would not be placed in double jeopardy. 48 N. J. 145 (App. 6a-50a).

Reasons for Granting the Writ

I. This Court in *Cichos* v. *Indiana* granted *certiorari* on the same question presented herein. However, after hearing the matter, this Court did not reach or decide the question tendered by the petition for *certiorari* and the writ was dismissed as improvidently granted. —— U. S. ——, 17 L. ed. 2d 175, 89 S. Ct. ——.

Prior to the decision in *Cichos* v. *Indiana,* this Court has had occasion to consider the question whether the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States. In *Palko v. Connecticut,* 302 U. S. 319, 58 S. Ct. 149, Mr. Justice Cardozo perceived the principle in these terms: the Due Process Clause of the Fourteenth Amendment prohibited the States from enforcing their criminal laws at the cost of violating some fundamental precept of justice, of imposing a "hardship so acute and shocking that our polity will not endure it.

Thereafter, in *State of Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 462-463, the case of an unsuccessful

execution, Mr. Justice Reed, writing for himself, Chief Justice Vinson, Mr. Justice Black and Mr. Justice Jackson declared that "our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense," and concluded, *inter alia*, not that the Due Process Clause has no double jeopardy content, but that there is "no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution." Mr. Justice Frankfurter, concurring in the judgment to form the majority stated that the Due Process Clause viewed as prohibiting fundamentally unfair state procedures, had some double jeopardy content, while the dissenters did not concern themselves with double jeopardy, but only with the claim that a second attempt to execute the prisoner would be a cruel and unusual punishment. Then followed *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948), where a unanimous Court held, without reserving the question of whether the Due Process Clause of the Fourteenth Amendment had any double jeopardy content, that a multiple offender statute does not subject "petitioner to double jeopardy," since the sentence as a multiple offender is not "viewed as either a new jeopardy or additional penalty for the earlier crimes."

This Court was not unanimous in *Brock* v. *State of North Carolina*, 344 U. S. 424, 73 S. Ct. 349 (1953), yet the difference arose not so much from the general proposition that the Due Process Clause places some limits on the power of a state to reprosecute, but from the application of this proposition to the particular reprosecution challenged—the State retried the petitioner after the first trial was halted and a mistrial declared because of the temporary unavailability of testimony by witnesses for the prosecution. The concurring Justice (Frankfurter, J.) and the dissenting Justices (Vinson, C.J. and Douglas, J.) em-

braced this general proposition, and although Mr. Justice Minton, writing for the Court, was less explicit, he did perceive the question presented (using the language of *Palko*), as whether "that kind of double jeopardy" was "a hardship so acute and shocking that our polity will not endure it." *Wade* v. *Hunter,* 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949), a case under the Double Jeopardy Clause of the Fifth Amendment was used to justify a negative answer to this question in *Brock.* Similarly in *Hoag* v. *State of New Jersey,* 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958) there was acknowledgment that certain state reprosecutions would be constitutionally impermissible. The petitioner was alleged to have robbed five persons on the same occasion. He was first tried and acquitted for robbing three of the victims; and the Supreme Court held that a second trial based on an indictment charging him with robbing the fourth victim was not an "impermissible use of multiple trials. Yet its premise was that some uses of multiple trials would be constitutionally impermissible. See 356 U. S. at 467-469, 78 S. Ct. at 833. See also *Ciucci* v. *State of Illinois,* 356 U. S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983 (1958) fragmented prosecution for homicide.

In *Bartkus* v. *State of Illinois,* 359 U. S. 121, 79 S. Ct. 676 (1959), this Court apparently assumed that there is some double jeopardy content to the Fourteenth Amendment. A State reprosecution following an acquittal in a federal prosecution for the same conduct, robbing a federally insured savings and loan association, was held permissible only because it was viewed as a reprosecution by another sovereignty for a crime against it. See also *Abbate* v. *United States,* 359 U. S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959). The Court's opinion in *Bartkus,* written by Mr. Justice Frankfurther, contains abundant suggestions that if the successive prosecutions were both

conducted by the same sovereignty, such as Illinois, the Due Process Clause of the Fourteenth Amendment does impose some restrictions on the power of a state to re-prosecute an individual for the same crime, though we are told by Mr. Justice Frankfurter, that this proposition had been established more than thirty years prior: "[I]n *Palko*, the Court ruled that * * * at some point the cruelty of harassment by multiple prosecutions by a State would offend due process." 359 U. S. at 127, 79 S. Ct. at 680, 3 L. Ed. 2d 684.

Although Mr. Justice Black concurred with the majority in *Cichos* v. *Indiana, supra,* he explicitly stated that he adheres to his views in *Bartkus* v. *Illinois,* dissent, 359 U. S. 121, 150 3 L. Ed. 684, 705 to the effect that the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States.

In the past, this Court has incorporated certain guarantees of the Bill of Rights into the Fourteenth Amendment, thereby making them applicable to the States. Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U. S. 319, 326, 82 L. Ed. 288-292 said that guarantees selected by the Court "have been taken over from the earlier Articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption." See, also, Brennan, The Bill of Rights and the States, 36 N. Y. U. Law Rev. 761 (1961); Henken, "Selective Incorporation" in the Fourteenth Amendment", 73 Yale L. J. 74 (1963).

This Court has heretofore held that other guarantees of the Bill of Rights to be absorbed into the Fourteenth Amendment—the First Amendment; See *e.g. New York Times* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710 (1964); the Fourth Amendment, *Mapp* v. *Ohio,* 367 U. S. 543, 81 S. Ct. 1684 (1961); *Ker* v. *California,* 374 U. S. 23, 83 S. Ct.

1623, 10 L. Ed. 2d 726 (1963); the just compensation, See *Chicago B. & Q. Railroad Company* v. *The City of Chicago,* 166 U. S. 226, 17 S. Ct. 581 (1897) and self-incrimination clauses of the Fifth Amendment, *Malloy* v. *Hogan,* 378 U. S. 1, 84 S. Ct. 1489 (1964); *Griffin* v. *California,* 380 U. S. 609, 85 S. Ct. 1229 (1965); The right to counsel, *Gideon* v. *Wainwright,* 372 U. S. 335, 83 S. Ct. 792 (1963) and confrontation clauses of the Sixth Amendment, *Pointer* v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065 (1965) and the Eighth Amendments prohibition against cruel and unusual punishments, *Robinson* v. *California,* 370 U. S. 660, 82 S. Ct. 1417 (1962).

The Supreme Court of New Jersey in the instant case stated that * * * "in view of the more recent cases in that Court, little doubt remains that the double jeopardy clause of the Fifth Amendment is binding on the States by virtue of the Fourteenth Amendment (App. 31a).

II. The decision of the Court below is believed to be erroneous and contrary to the decision of this Court in *Downum* v. *United States,* 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). A comparison of the facts and rationale of *Downum* with those here reveals that the instant case requires the protection against double jeopardy more so than in *Downum.* In *Downum,* on the morning that the case was called both sides announced ready. A jury was selected, sworn and instructed to return at 2:00 P. M. When it returned, the Prosecutor asked that the jury be discharged because his key witness on two counts of the indictment was not present—a fact discovered by the Prosecutor only during noon recess. It was not contended that the failure to secure the attendance of this witness was in any way deliberate or based upon the Prosecutor's conclusion that the impaneled jury was likely to

acquit. Instead, the "jury first selected to try petitioner and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence." This Court held that *Downum* could not be reprosecuted, since, by virtue of prosecutorial neglect, he was denied his constitutional right to have the impaneled jury hear and decide his case. The Court said, "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion.' ". 372 U. S. at 378. The later case of *United States* v. *Tateo*, 377 U. S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964) affirms the holding of this Court in *Downum* v. *United States, supra,* and distinguished the facts as follows at page 467: "*Downum* v. *United States*, 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 is in no way inconsistent with permitting a retrial here. There the Court held that when a jury is discharged because the prosecution is not ready to go forward with its case, the accused may not then be tried before another jury. * * *"

In the instant case, the need for the statements in the Prosecutor's possession was vital and necessary to petitioner's defense. For it was the petitioner's contention before the trial court and the New Jersey Supreme Court that he could not recall the circumstances of the shooting. Because of the insanity defense and lack of memory of the shooting, the trial court and the Supreme Court of New Jersey ordered the delivery of all statements, papers and documents connected with the within indictment. See, *State* v. *Farmer*, 45 N. J. 520 (App. 1a-3a). The failure to carry out the mandate of the court below by the prosecution was revealed at the trial, after the jury was impaneled and witnesses sworn. The trial court declared a mistrial on its own motion and concluded that the Prosecutor's interpre-

tation of the New Jersey Supreme Court's order was erroneous and must be regarded as the producing cause of the mistrial but that under the circumstances of the case, it would not be fundamentally unfair to require retrial of the defendant (App. 29a). The court below agreed with this conclusion characterizing the State's action as "good faith error" (App. 36a).

Retrial following discharge of a jury is prohibited unless the mistrial was granted with defendant's consent, which is not present here, or out of manifest necessity. *Wade* v. *Hunter,* 336 U. S. 684, 93 L. Ed. 974. The courts have recognized necessity when there is a breakdown of judicial machinery, *Gori* v. *United States,* 367 U. S. 364, 372; when the first jury is hung, *United States* v. *Perez,* 22 U. S. (9 Wheat) 579; a juror is disqualified, *e.g. Simmons* v. *United States,* 142 U. S. 148; the trial judge dies, *Freeman* v. *United States,* 237 Fed. 815; or war closes the court, *Wade* v. *Hunter,* 336 U. S. 684. Other instances of imperious necessity are cited by Justice Douglas in his dissenting opinion in *Gori* v. *United States,* 367 U. S. at page 371.

The prohibition is not against being twice punished, but against being twice put in jeopardy. *United States* v. *Ball,* 163 U. S. 662, 669, 41 L. Ed. 300, 302, 16 S. Ct. 1192. The rationale of the doctrine of double jeopardy was expressed by the Court in *Green* v. *United States,* 355 U. S. 184, 187, 2 L. Ed. 2d 199, 78 S. Ct. 22. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state

of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

It cannot be contended that the injury to petitioner was less substantial than the injury to *Downum*. Each was deprived of his "valued right to have his trial completed by a particular tribunal". *Wade* v. *Hunter, supra*. Petitioner was subjected to the taking of evidence; *Downum* was not. The material ordered delivered to petitioner before trial was withheld until the jury was impaneled and trial commenced. The Prosecutor's action was the producing cause of the mistrial.

We submit that the questions posed herein are of substantial constitutional dimensions meriting a determination by this Court and that the New Jersey Supreme Court has decided a constitutional question not in accord with the applicable decisions of this Court.

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully submitted that this petition be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

(Opinion of Supreme Court of New Jersey— Reported in 45 N. J. 520)

SUPREME COURT OF NEW JERSEY

M-13 September Term 1965

STATE OF NEW JERSEY,

Plaintiff-Appellant,

vs.

CHARLES FARMER,

Defendant-Respondent.

Argued September 13, 1965—Decided September 21, 1965.

Mr. Edward J. Dolan, Middlesex County Prosecutor, argued the cause for appellant.

Mr. Raymond A. Brown argued the cause for respondent (*Mr. Irving I. Vogelman*, on the brief).

The opinion of the Court was delivered PER CURIAM.

The State seeks leave to appeal from interlocutory order granting defendant pretrial discovery of grand jury

testimony and statements taken by the prosecutor from persons other than defendant. The trial court deemed the circumstances to be exceptional and to warrant a relaxation under R.R. 1:27A of the pertinent rules of Court. R.R. 3:3-7; 3:5-11. See *State* v. *Reynolds,* 41 N. J. 163, 182 (1963); *State* v. *Clement,* 40 N. J. 139 (1963); *State* v. *DiModica,* 40 N. J. 404 (1963); *State* v. *Moffa,* 36 N. J. 219 (1961); *State* v. *Johnson,* 28 N. J. 133, 143-144 (1958). We directed oral argument on the application.

For a period after the alleged murder defendant was confined to mental institution under a judgment that he was unable to defend against the indictment. See *Farmer* v. *State,* 42 N. J. 579 (1964). Psychiatrists have testified that the defendant claims he blacked out before the killing, and defendant has filed with us an affidavit that: "I cannot to this day recall any of the events of September 18, 1963 which surround the alleged shooting at my home involving my wife and me." In the circumstances defense counsel believes he cannot prepare for trial without the inspection he sought.

The State apparently is primarily concerned with the possible precedential influence of the order in other cases. Beyond a belief that some tactical advantage inheres in withholding disclosure until trial, the prosecutor can see no harm. In other words, the prosecution will not be hampered, and neither the grand jury testimony nor the statements in question contain anything which should be sealed even at trial in the public interest. At the argument, the possibility was suggested that the papers in question might contain statements by third persons which could not aid defendant but the disclosure of which might embarrass such third persons or others. In this regard counsel for

defendant expressed his willingness to cooperate, and in any event the trial court can order a modification of its order. We note also that the State does not suggest relief should have been conditioned upon a like disclosure by defendant of statements of his witnesses, and counsel for defendant says that in fact he has nothing to exchange. See *State* v. *Cook*, 43 N. J. 560, 568 (1965); *State* v. *Whitlow*, 45 N. J. 2, 21 (1965).

Defendant's application was addressed to the discretion of the trial court. In view of the unusual circumstances of this case, we are not persuaded that the trial court erred in his decision. Leave to appeal is accordingly denied.

PROCTOR, J. (Dissenting)

I would grant the State leave to appeal from the interlocutory order of the trial court relaxing R.R. 3:3-7 and 3:5-11.

If this defendant may examine before trial grand jury testimony, I can see no reason why any defendant, who alleges that he was not either physically or mentally at the scene of the crime, would not be accorded similar discovery. Such an abandonment by this Court of R.R. 3:3-7, which has its origins in the early history of the common law, should be effected through the rule-making power, or at least after an appeal has been fully heard; certainly it should not be done on a motion for leave to appeal from an interlocutory order. The public policy behind R.R. 3:3-7 is set forth in *State* v. *Clement*, 40 N. J. 139, 143-144 (1963). See also *United States* v. *Rose*, 215 F. 2d 617, 628-629 (3 Cir. 1954).

> "If we are to change the policy, it should be done, not by going beyond the rule in particular case

> as here, but by amending after full review and re-evaluation of the many considerations involved." Justice Hall dissenting in *State* v. *Moffa,* 36 N. J. 219 at 228 (1961).

See also my dissent in the same case at page 225.

I know of no case in this state where grand jury testimony of witnesses has been given to the defense before trial solely on the grounds that it would assist in the preparation of defendant's case. *Cf. State* v. *Clement, supra,* and *State* v. *Moffa, supra.* Because of the protection afforded a defendant by the procedure permitted in *State* v. *DiModica,* 40 N. J. 404, 408-11 (1963), the compelling circumstances which would call for the relaxation of R.R. 3:3-7 on the basis of "surprise or injustice" (R.R. 1:27A), are not here present. Indeed, *State* v. *DiModica* goes further in tempering the strict rule of grand jury secrecy in the interest of a fair trial than the federal courts have found necessary. See *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395, 3 L. Ed. 2d 1323 (1959).

As to statements of witnesses taken by the prosecutor, R.R. 3:5-11 expressly excepts such statements from the scope of defendant's pre-trial discovery. My discussion above of the secrecy of grand jury testimony is likewise applicable here. A rule such as R.R. 3:5-11, firmly grounded in long established policies, should not be eroded without "full review and reevaluation of the many considerations involved."

APPENDIX B

(Opinion of Supreme Court of New Jersey— Reported in 48 N. J. 145)

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

CHARLES FARMER,

Defendant-Appellant.

Mr. Raymond A. Brown argued the cause for appellant.

Mr. John P. Kozak, Assistant Prosecutor, argued the cause for respondent (*Mr. Edward J. Dolan,* Middlesex County Prosecutor, attorney; *Mr. Kozak* on the brief).

The opinion of the court was delivered by FRANCIS, J.

The issue to be determined here is whether the defense of double jeopardy is available as a bar to the proposed retrial of the defendant for murder. A previous trial came to an early abortive end when the trial court declared a mistrial *sua sponte* and over the objection of both State and defendant. Thereafter defendant's motion to dismiss the

indictment on the ground that he could not be placed in jeopardy again was denied. We granted leave to appeal from the denial.

On November 15, 1963 the Grand Jury of Middlesex County indicted defendant Charles Farmer for first degree murder after he fatally shot his wife Barbara Farmer on September 18, 1963. There is no doubt Farmer killed the deceased, or that immediately thereafter and as part of the incident he shot himsef. The principal defense to the indictment appears to be that he was insane at the time of the shooting.

After wounding himself Farmer was taken to St. Peter's General Hospital in New Brunswick, N. J. where he remained under treatment for some time. On February 3, 1964, following a hearing which began on January 22, 1964, the Superior Court, Law Division, found him mentally incompetent to stand trial, and committed him to the State hospital for the criminally insane. See, *Farmer* v. *State*, 42 N. J. 579 (1964). Subsequently, on May 25, 1965, again after a hearing, the Law Division declared him mentally fit for trial, and the State prepared to proceed.

On July 14, 1965, Farmer moved in the trial court for an order to permit pretrial discovery of the State's case. Specifically he asked leave "(a) To inspect, copy and photograph all statements, papers and confessions concerned with the within indictment. (b) To inspect and copy all those grand jury minutes concerned with the within indictment. (c) To inspect and copy all medical, psychiatric and neurological reports pertaining to the defendant. (d) To inspect and copy all ballistic reports and paraffin reports made in connection with any firearms allegedly used in connection with the death of Barbara Farmer. (e) To examine any

and all firearms and instruments concerned with the within indictment. (f) To inspect, copy and photograph all photographs concerned with the within indictment. (g) To inspect and examine any clothing worn by Barbara Farmer or Charles Farmer on September 18, 1963." Defendant's affidavit supporting the motion alleges that at least four psychiatrists have stated he was insane at the time of the commission of the alleged crime. It then proceeds: "For the above reasons, I respectfully represent to the Court that I have need to examine all Grand Jury testimony given before the Grand Jury of Middlesex County concerning my case in order that I may prepare for my trial along with my attorney, who represents me upon this motion for examining the Grand Jury testimony. * * *" The focus of the affidavit was on the grand jury minutes. It concluded as follows:

> "I have retained counsel who has vigorously investigated this case and the difficult of acquiring facts at this posture convinces me that examination of all the Grand Jury testimony is essential to my defense."

No specific reference was made to a need for examination of statements of witnesses obtained by the State, or a request for copies of any such statements.

At the argument of the motion defense counsel not only sought leave to examine the grand jury minutes; he pursued also permission "to inspect, copy and photograph all statements * * *" as indicated in paragraph (a) of the notice described above. The argument of the parties although not included in the appendix has been examined by us. In substance defendant asserted by his attorney that he needed the State's statements of witnesses because he could not

recall the circumstances of the shooting.[1] See *Farmer* v. *State, supra,* 42 N. J., at p. 582. Apparently because of the insanity defense and the allegation of lack of memory of

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[1] In argument defense counsel said:

> "But we stand before the bar ready to go to trial with a defendant whom, I think, it has to be admitted suffered amnesia and was insane at the time. I am before the bar of Justice. I don't know what happened. The State does know what happened.
>
> "Now, this I submit to your Honor is the showing of particularized need.
>
> • • • •
>
> "This man present was not present. This man physically functioning was not functioning within the concept of the law considered under the interdict of a criminal charge.
>
> • • •
>
> "But here this man, insane, helpless, must ask the State for aid.
>
> "He must say, 'Give me the statements of those who are going to appear against me. Give me that which will tell me what I did.'
>
> "This might even influence a plea. I doubt it very much in this case because of a plea of insanity, of course precludes such a thing, but it might conceivably do so. * * *
>
> • • •
>
> "Now, in this case Mr. Farmer was not present at the scene of the crime. In body, yes; apparently as far as any cognizable ability, he had none. He was unaware of what was happening, unable to know what was right, wrong, unable to know and unable to repeat for his counsel or to recall for himself the event."

(Continued on following page)

the shooting, the trial court granted the motion and signed a discovery order in the precise language set forth above as paragraphs (a) through (g) of the notice. In doing so Judge Convery commented that the decision "went further than any court has." The ruling required a liberal view of Revised Criminal Practice rule R.R. 3:3-7, and relaxation of R.R. 3:5-11, *infra*.

The State sought leave to appeal from paragraphs (a) and (b) of the order which gave leave

> "(a) To inspect, copy and photograph all statements, papers and confessions concerned with the within indictment;

(Continued from preceding page)

Counsel then referred to his understanding, that a young attorney, D. T. Hague, was present at the shooting, and he suggested "this man's testimony is necessary to tell Mr. Farmer, now that he has been declared competent, what happened at that time and place." Further he suggested Rule 3:5-11 be relaxed and Farmer given "the right to inspect the testimony of someone who will, for the first time, be able to say to him, 'Mr. Farmer, this is what happened' because he cannot have known."

In opposing the motion, the prosecutor said he stood squarely on *State* v. *Johnson*, in which the Supreme Court had, while requiring inspection of defendant's confession, denied access to the statements of witnesses. That the prosecutor was thinking in terms of statement of witnesses with respect to the criminal event seems plain. He said:

> "* * * And if you give the statements of other witnesses then the next step would be the work product of the police who investigated it, their reports. * * *"

There was no specific discussion as to the exact significance or the exact nature of the discovery covered by the order.

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"(b) To inspect and copy all those grand jury minutes concerned with the within indictment."

Because of the unusual nature of the case, we heard oral argument on the application. Thereafter and before our decision was announced, defendant filed an affidavit stating: "I cannot to this day recall any of the events of September 18, 1963 which surround the alleged shooting at my home involving my wife and me." Thereupon we affirmed the trial court's order. *State* v. *Farmer*, 45 N. J. 520 (1965).

When the trial judge observed that his decision went beyond the holding of any of our cases, he was correct. In recent years, however, discovery in criminal cases has been undergoing an evolutionary process, undoubtedly stimulated in large measure by the opinion of the United States Supreme Court in *Jencks* v. *United States*, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957).

[1] At the time of *Jencks* New Jersey had and still has two practice rules relating to the matters involved here. R.R. 3:3-7 provides:

"The requirements as to secrecy of proceedings of the grand jury shall remain as heretofore."

This rule represented the traditional veil with which grand jury proceedings have been surrounded. But within the past few years we have lifted that veil on being satisfied under the circumstances of a particular case that the policy of secrecy should be subordinate to the search for the whole truth. See, for example, *State* v. *Mucci*, 25 N. J. 423 (1957); *State* v. *Moffa*, 36 N. J. 219 (1961); *State* v. *Clement*, 40 N. J. 139 (1963); *State* v. *Farmer*, *supra*.

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Moreover, following *Jencks, supra,* the Court held in *State* v. *Hunt,* 25 N. J. 514 (1958), that when a witness for the State in a criminal proceeding testifies that prior to taking the witness stand he had refreshed his recollection from notes made earlier by him or some other person, defendant was entitled to have such notes produced for his examination and use on cross-examination, if desired. The opinion plainly indicated also that if the witness had made notes or a statement prior to trial covering the topics of his testimony, the notes or statement were likewise subject to defendant's demand, even though the witness had not used them to refresh his recollection before trial. See *State* v. *Johnson,* 28 N. J. 133, 143 (1958).

R.R. 3:5-11 says:

> "Upon motion of a defendant made at any time after the filing of the indictment or accusation, the court shall order the prosecutor to permit the defendant to inspect and copy or photograph designated books, tangible objects, papers or documents other than written statements or confessions made by the defendant obtained from or belonging to the defendant and may, if the interests of justice so require, order the prosecutor to *permit the defendant to inspect and copy* or photograph written statements or confessions made by the defendant and *designated books, tangible objects, papers or documents obtained from others except written statements or confessions.*" (Emphasis added.)

We interpreted this rule to require the State to permit a defendant to inspect and copy a confession allegedly made by him. It was said that such disclosure, although not re-

quired constitutionally, clearly promoted the quest for truth. *State* v. *Johnson,* 28 N. J. 133 (1958). Since that time it has become routine practice for county prosecutors to supply a defendant with a copy of his confession whenever such a request is made.

The defense motion in *Johnson,* however, had another aspect. It sought leave to inspect statements made by prospective witnesses for the prosecution. On its face such request was squarely within the express proscription of R.R. 3:5-11, *supra.* As noted above, we had already held in *State* v. *Hunt, supra,* that during the trial and when a witness is on the stand, the prosecution must yield to defendant's demand for production of any pertinent notes or statements made or used by the witness prior to the giving of his testimony. See also, *State* v. *Reynolds,* 41 N. J. 163, 182 (1963). But although we were aware of the ongoing agitation for broader discovery in criminal cases, and the arguments for and against such discovery, we felt it unwise to abandon or revise our rule "without fuller experience with the practical operation of *Hunt* and more information with respect to experience in other jurisdictions in which pretrial disclosure exceeds" what had been authorized in New Jersey. *State* v. *Johnson,* 28 N. J., at p. 143. It was pointed out further that Johnson had made no showing which would invite relaxation of R.R. 3:5-11 under the provisions of R.R. 1:27A. Finally the opinion suggested that the problem should be explored at a judicial conference at such appropriate time in the future when all considerations relevant to the just and proper administration of the criminal law could be presented.

Study of the problem continued until another aspect of it was submitted for judicial determination. In *State* v. *Tate,*

47 N. J. 352 (1966), this Court decided that under the circumstances presented the defendant was not entitled to an order to compel certain State's witnesses (who were to be produced at the trial) to testify on depositions in advance of trial. In that opinion the bar was advised of the scheduling of a Judicial Seminar in September 1966 to be open to all who might contribute to solution of the problem of discovery in criminal cases. The Seminar was held and the material presented is being assembled for this Court's consideration. 89 *N. J. L. J.* 613 (1966).

The development of discovery in criminal cases has been outlined not only to show its evolution in our State, but also to indicate that the major controversy has centered around efforts on the part of the defense to obtain copies of the statements of the State's witnesses, who saw the crime committed or who furnished information tending to establish defendant's criminal participation in it. There is no reported case in our State in which the defendant moved for or was allowed inspection of investigation reports of police or detectives, or summaries of such reports, or reports or written opinions of such persons or members of the prosecutor's staff as to the guilt or innocence of the accused. Matters of that nature, which are generally thought of as "work product," have been free from inspection demands. It was in this legal milieu that Farmer moved for the generalized and unspecific discovery set out in paragraph (a) of his notice.

When the motion was argued in the trial court, and the propriety of the resulting order argued in this Court, it was obvious that the focus of the collective minds was on the right of the defendant to inspect and copy the signed or unsigned statements of the State's witnesses, in the

sense that such statements were thought of ordinarily. That is, attention was on statements signed or unsigned taken by police authorities from witnesses relating to the criminal incident itself, rather than on statements or reports of police officers concerning matters which occurred after the shooting and which were not directly associated with it. This is evidenced by defendant's affidavit in this Court that he could not recall any of the events which surrounded the "alleged shooting at my home, involving my wife and me." Also, our *per curiam* opinion denying leave to appeal from the order recites that the "State seeks to appeal from an interlocutory order granting defendant pretrial discovery of grand jury testimony and *statements taken by the prosecutor* from persons other than defendant." *State* v. *Farmer, supra,* 45 N. J., at p. 521. Moreover, in the latest case of *State* v. *Tate, supra,* when the Chief Justice was speaking of the various types of discovery we had sanctioned previously, he described the *Farmer* holding as follows:

> "Where, because of insanity, a defendant was unable to aid his counsel in *reconstructing the criminal event,* we ordered the State to permit pretrial inspection of both grand jury testimony and statements taken by the State from persons other than the defendant." (47 N. J., at p. 355; emphasis added)

All of the above discussion is not set down to demonstrate that the prosecutor's interpretation of the scope of his obligation under the discovery order (which precipitated the controversy now before us) was correct. The purpose is simply to reveal the climate in which he was called upon to construe the order. Although we agree that his interpreta-

tion was incorrect in the light of its broad and unrestrained language, that climate is significant in evaluating his good faith. Basically the difficulty arose when the prosecutor consented to the *form* of the order prepared by defense counsel, which granted leave:

> "(a) To inspect, copy and photograph all statements, papers and confessions concerned with the within indictment."

If there had been insistence upon more specificity in the light of the argument, the difficulty might not have arisen.

In any event, after the execution of the broad order, the prosecutor delivered to defense counsel the testimony of the witnesses before the grand jury, copies of signed statements of five witnesses and copies of the notes of oral statements of several other witnesses. These statements squared with the notion that defendant was to be aided in the reconstruction of the criminal event.

On January 4, 1966 trial of the indictment commenced with the impaneling of a jury. As the jurors were drawn and *voir dire* interrogation began, it was made clear by the State that reliance was to be placed on the testimony of lay witnesses to establish Farmer's legal sanity and therefore his criminal responsibility for the crime. For some reason, which is of no moment on this appeal, a mistrial was declared by consent of the parties. Thereafter, there was an interval of 13 days before the cause was again reached for trial. During that period the defense knew the prosecution intended to rely *in rebuttal* on lay testimony to prove Farmer's sanity. (See *State* v. *Whitlow*, 45 N. J. 3, 23 (1965)). Counsel knew also that he had not been furnished with any signed statements or notes of oral state-

ments of any such witnesses. Yet the record reveals no evidence of a demand for the names of such witnesses or their statements. A permissible inference is that experienced counsel construed the discovery order, in this respect at least, in the same fashion as the prosecutor.

Drawing the jury for the second trial began on January 17, 1966, and two weeks were consumed before the full panel of 14 jurors was completed. During the *voir dire* interrogation it again appeared that the State would rely on lay testimony in rebuttal to prove defendant's sanity. The trial judge in his memorandum denying the later double jeopardy plea recognized this. He said:

> "* * * [S]uch voir dire disclosed that the state apparently had no contrary professional psychiatric testimony [to defendant's claim of insanity] but would rely entirely upon lay opinion as to the defendant's sanity." (insertion ours)

At defendant's request during the *voir dire,* the State gave him a list of the witnesses it intended to call at the trial. This was done so an inquiry could be made of each prospective juror as he was called as to whether he knew any of those witnesses. The list included the lay witnesses, most of them police officers, who were to be called by the State in rebuttal on the issue of insanity. Defendant's attorney then knew that no signed or unsigned statements of these persons had been furnished to him. Yet at no time during the two weeks of jury selection or after the introduction of testimony and exhibits began, until the impasse to be discussed later was reached, does the record reveal that he called this fact to the attention of the judge or made a motion that their statements; if any, be delivered

to him, or that the suggestion was advanced that such statements were within the scope of the discovery order. Moreover, when the jury had been completed and sworn, the State and defense presented their openings. Again the assistant prosecutor made it plain that in meeting the claim of insanity the State would produce and would rely upon the testimony of lay witnesses to counteract professional psychiatric evidence to be offered by defendant. The significance of this emphasis on lay testimony could not have escaped defense notice; nor can it be deemed likely that the defense did not realize that witnesses would be called in addition to those whose statements had been turned over to defendant.

At this point, even though this appeal is from an interlocutory order and the factual record is therefore incomplete, it seems advisable to digress from the trial proceeding in order to refer to certain background material which beyond question was known to the defense.

For some time before the shooting marital discord existed between Farmer and his wife Barbara. Civil litigation was pending between them in which each was represented by counsel. In one pending action Farmer was seeking to have his wife declared mentally incompetent. On August 16, 1963, Farmer's attorneys in the civil proceedings engaged Pinkerton's National Detective Agency to provide guards on the Farmer premises each night thereafter from 8 p.m. to 7a.m. to deny entrance to Mrs. Farmer and certain other persons. In addition, the attorneys obtained an order from the county judge, who later tried the homicide case, restraining Mrs. Farmer from entering the building thereon, which was a combination residence and office. Thereafter, and until September 18, the day of the homicide, the Pinkerton guards performed the required night duty.

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On September 18 at about 5 p.m., by arrangement between the attorneys for Mr. and Mrs. Farmer, Mrs. Farmer in company with Douglas T. Hague, an associate with the law firm representing her, and some other persons, went to the premises to pick up some of her belongings. On arrival there Mrs. Farmer and the attorney walked upstairs to a second floor bedroom. Mr. Farmer followed them into the room and some words were exchanged. While she was engaged in gathering her clothing and while the attorney was still in the room, Farmer shot her and then turned the gun on himself. The police and Pinkerton representatives appeared on the scene within a very short time thereafter.

We return now to the trial and the outline of its progress after the opening. The State called two witnesses, one a member of the local police department, the other an identification officer attached to the prosecutor's staff. They described the Farmer premises generally and the bedroom wherein the shooting occurred. They identified a number of relevant photographs including some showing the bodies of the defendant and his wife on the bedroom floor shortly after the fatal event.

Then a Sergeant Earl F. Eichler of the local police department was produced. He and Officer Harry Emmons arrived at the Farmer residence a very few minutes after the fatal shooting, and while Mr. and Mrs. Farmer were lying on the floor of the bedroom. On reaching the second floor Eichler was handed a sweater by Hague. It was wrapped around a revolver. Continuing into the bedroom he found Farmer lying on the floor with his head on a pillow. Sergeant John Revie of the Pinkerton Agency was kneeling to the right of him. Mrs. Farmer was lying on the floor with a portion of the upper part of her body in

the clothes closet and the remainder in the bedroom. Eichler went to the left side of Farmer; Hague was alongside Eichler. Farmer's eyes were open and he was conscious. At this point in the assistant prosecutor's examination it appeared that Hague had made a statement to Eichler which Farmer had answered or commented upon. Defense counsel objected and, after the jury was excused, he said that the prosecutor had not given him any statement from Eichler prior to trial, as he was required to do under the discovery order which we have discussed above.

The assistant prosecutor replied that he did not have what he considered a statement from Eichler within the meaning of the order. He did have a three-page report from Eichler entitled, "Supplementary Offense Report—Department of Police," made to his superior on the day of the shooting, and later made available to the prosecutor's office. It set forth the circumstances under which he was sent to the Farmer premises, the officers who accompanied him there and what he saw and heard while there, particularly the comment of Farmer in the presence of Hague and the Pinkerton man which he was about to testify to when the defense objection came. The report referred to a number of other persons who responded to Eichler's telephone call, such as a doctor, members of the local rescue squad who removed Farmer to the hospital, additional police officers and representatives of the prosecutor's office, who took pictures and measurements. It listed a number of articles, considered material to the case, such as a revolver and an automatic pistol, cartridges, a shoulder holster, etc., as well as objects, such as jewelry and the like, removed from Mrs. Farmer's body, and her handbag and its contents. It reported finally that all of the ar-

ticles were delivered to police headquarters and locked in the safe. The first page of this report was signed by Sergeant Eichler.

During the argument as to whether Eichler's report should have been furnished to defendant in advance of trial, in answer to court questions it appeared that the prosecutor had in his file a number of signed and unsigned reports of police officers and sheriff's officers. As it later appeared when produced, they referred to investigational efforts and other activity, such as guarding Farmer during his stay in the hospital; copies of reports and statements given by Pinkerton operatives to their superiors and perhaps some statements of Pinkerton men given directly to the police; and affidavits and one signed statement of Sergeant John Revie, the Pinkerton officer who was on the premises in the Farmer employ when the shooting occurred. One, a lengthy affidavit dated September 26, 1963 covered, among other things, Revie's version of the conversation in the bedroom which Sergeant Eichler was about to describe when the objection came; the jurat thereto was taken by an attorney associated with the office of Farmer's attorneys. Some of the documents were summaries of the investigation and the case, prepared either by local police and delivered to the prosecutor or by a detective on the prosecutor's staff. Two of the other three Revie affidavits were made before the homicide occurred and outlined his activities on the Farmer premises, including an account of an alleged unpleasant visit there by Mrs. Farmer on August 28, 1963. The jurats on these affidavits were signed by attorneys representing Farmer, and of course were in their possession before the shooting. The fourth statement, undated but undoubtedly signed very shortly after

the shooting, is designated a "report * * * relative to the incident * * * on September 18, 1963" apparently made to the Pinkerton Agency. It covers substantially the same material as appears in the lengthy Revie affidavit already described, sworn to before one of Farmer's attorneys.[2]

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[2] The State had already delivered to the defense Revie's lengthy testimony before the grand jury. In addition the State had turned over at the same time a 19-page statement of Revie in question and answer form made within a few hours after the shooting. In that statement Revie said he had given "depositions" previous to the shooting to Farmer's law firm, about matters occurring during his guard duty on the Farmer estate. These "depositions" undoubtedly are the Revie affidavits of August 29 and September 4, 1963 prepared by and sworn to before Farmer's attorneys. Copies of them were among the papers submitted to defendant at the trial. Moreover, on Revie's grand jury appearance he said he had talked about the case on two occasions with Farmer's attorney (not present defense counsel) before testifying. Therefore, Revie's knowledge of the case was thoroughly in the hands of the defense before trial, and it is unlikely in the extreme that Farmer suffered any prejudice in not receiving the additional and largely repetitive statements about the criminal event and the circumstances preceding it.

The report of Officer Engel delivered at the trial referred to a comment made by Farmer after the shooting and while he was lying on the floor, apparently in answer to a comment by *the witness* Hague which Farmer overheard. Farmer's alleged remark in the report appears to be the only fact of any consequence not contained in testimony or other statements already in the defense possession before trial. But the defense did have before trial *Hague's* extensive testimony before the grand jury as well as his full 36-page statement in question and answer form made about two hours after the shooting.

One of the police reports furnished at the trial and complained about by defendant was made on August 24, 1965, and described the purchase of the fatal gun by defendant from one Hoey in the pres-

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Included among these papers was an unsigned memorandum to the prosecutor dated May 26, 1965, a year and a half after the event, noting an unsolicited conversation with one of Farmer's daughters. At oral argument we were advised that the State did not intend to call her as a witness.

Included also were a number of reports and statements from police officers and sheriff's men who had been detailed to guard Farmer's room during his stay in the hospital. They seem to be the ones most seriously objected to by defense counsel. They reported Farmer's condition in the hospital, his physical and mental activity while there, his conversations with the officers and others, such as members of his family, his attorneys and an officer of his engineering company. It appears also from these reports that dur-

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ence of Pinkerton agent Soriano. This was not news to defense counsel. In Revie's testimony before the grand jury he talked of Farmer's application for a permit to buy a gun and his purchase of it on September 13, five days before the fatality. Additionally, in the ballistics report furnished to defense counsel *six months* before trial, a notation appears that the revolver examined was purchased by Farmer on September 13, 1963 from Frank Efinger. (The police report showed the place of purchase as Efinger's Sporting Goods, Inc.)

Other police reports delivered at the trial were in large measure investigation summaries, repetitive of material already in the defense possession, and not particularly significant otherwise. However, a number of them, as has been said, reported on the officers' observations of, conversations with and activities of Farmer in the hospital after he shot himself. There is no doubt they contained substantial material relevant to the issue of insanity later projected as a defense by Farmer. It is clear that under the discovery order the defense should have had them before trial.

ing the early part of the hospital confinement, at the request of Farmer's attorneys, Pinkerton men also were stationed in the hospital room.

The above outline is intended to indicate the nature of the reports and statements which had not been delivered to the defense in advance of trial. No attempt has been made to set down their content in precise detail.

While Eichler was on the witness stand and before any examination of the reports and statements by the court or defense counsel, the judge expressed the view that, because of the allegation of lack of recollection on Farmer's part, they constituted "statements," or "papers" within the broad scope of paragraph (a) of the discovery order, and should have been turned over to the defense prior to trial. The judge inquired as to the number of such papers which were in the State's file. He was told there were "quite a number." (In fact 28 were produced.) Then the following took place:

> "The Court: When do you want them?
>
> Mr. Brown: Now, sir.
>
> The Court: Do you want a mistrial now?
>
> Mr. Brown: I am not moving for it. My gosh, sir.
>
> The Court: Well, I don't want one.
>
> Mr. Brown: I don't know why the Prosecutor cannot cure this. If your Honor is in accord with my argument I would be content if there are quite a few to have them delivered to me now so that I can determine how long it would take me to examine them and have the trial continue at this point, subject to what I discover. I have no purpose in pressing for a mistrial.

I further wish to state I limit my argument to the conditions of what I consider an order of the Supreme Court. I cast no aspersions on anyone."

At this time the court examined Sergeant Eichler's report and suggested that it should have been made available to defendant. In reply the assistant prosecutor said it was his view that such reports were of the type which under *State* v. *Hunt* must merely be made available to the defendant at trial for cross-examination of the witnesses. After some short colloquy Mr. Brown said:

"Well, your Honor, if the Prosecutor refuses to give me the paper then I have no alternative but to press for a mistrial.

"I just want to make clear to your Honor that I do not press or push anybody, but if I don't get what the order says then I will ask for a mistrial."

Counsel declined to proceed with the cross-examination of Eichler or to let the trial proceed any further until he received all the statements and reports. He said:

"Well, I object to proceeding with any other witness if I am to be limited in that way [referring to the State's offer to use other witnesses and not to introduce any matter contained in a report until all papers were given to him]. I will therefore request a mistrial because the Prosecutor has not obeyed the order of the court.

"I ask for everything he has got. I ask for it now. I ask your Honor to permit me to have it prior to continuing, and if your Honor does not see fit and rules in accordance with that, I then ask for a mistrial.

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"I don't wish to press it, but that is my position." (Insertion ours.)

Thereafter the assistant prosecutor said:

"Well, I'm the last one, your Honor, next to Mr. Brown, who wants a mistrial to occur in this case. We have spent too much time on it already."

A recess was taken until the following morning to permit the State to remove the pertinent papers from the file and deliver them to the defense that afternoon. The State made the delivery, except for the copies of the Pinkerton Agency report and statements of its operators to their superiors (described above) concerning their activities on behalf of Farmer prior to the fatal event. Apparently the assistant prosecutor was not familiar with them but, since they had been "specifically requested," a search disclosed them in the office and they were given to Mr. Brown, presumably on February 3.

When the trial was resumed, apparently two days later, February 3, defense counsel moved to suppress all of the evidence disclosed by the statements and reports, and all evidence which "would flow" from them. And he said that if the court declined to suppress, then he moved for an acquittal. A lengthy argument followed in which the prosecutor was charged with double dealing and violating the discovery order and doing so contumaciously and in bad faith in failing to turn over the reports and statements long before trial. At a subsequent point he said he intended no personal attack on the prosecutor's "ethics, his character or his ability and if this was so construed I owe Mr. Dolan an apology." He explained that the terms contu-

macious and bad faith were used in the "legal sense" as expressed in the cases. The assistant prosecutor denied there had been any attempt or intent to violate the discovery order. He and the prosecutor had discussed the matter. The prosecutor who had argued the propriety of the order in this Court advised him that the turning over of police reports was never mentioned. They concluded on the basis of the previous state of the law, the practice rule, R.R. 3:5-11, *supra,* and the argument of the motion in the trial court and Supreme Court, that such reports were not intended to be included.

After the trial court had indicated disagreement with the State's construction of the order, the assistant prosecutor said:

> "* * * I concede that within the framework of the first paragraph of the Order, where it refers to the statements, confessions and papers, that is broad enough in the abstract to cover each and every one of these statements which were turned over to Mr. Brown [two days previously]. In any event, this was examined very carefully, this entire aspect was examined very carefully, before certain documents were turned over to Mr. Brown pursuant to the court order rendered by Judge Convery, and it was our thought at the time—and again I represent to this court that this was not done with any idea of chicanery, of double dealing, of cutting corners, but on the honest conclusion that we were not required to submit to counsel for the defendant police reports rendered during the course of the investigation of the homicide and during the course of guard duty performed by the Highland Park Police and the Sheriff's officers.

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> "We felt then and we felt until two days ago that these reports would be readily available to each of these witnesses as the time for cross-examination approached, and that, of course, would be in complete consonance with the Supreme Court decision in State vs. Hunt, subsequently affirmed in other cases * * *"

He called to the court's attention further that while he was preparing the case for trial he and Mr. Brown had discussed whether he was required to advise Mr. Brown of any pertinent information communicated to him orally by prospective witnesses, which he had not already furnished the defense. This had resulted in a pretrial motion for a ruling on the matter. After argument the trial judge had sustained the State's position that any such oral statements need not be given defendant in advance of trial. The question of duty to deliver police reports of the nature which later created the mistrial problem was not presented at that time. Even though the court found at the trial that the prosecutor had acted in good faith with respect to these reports, the mistrial probably would have been avoided had he sought a pretrial ruling on the matter.

As the argument proceeded at the trial, the State suggested a recess be taken to enable the defense to make any invstigation or further preparation considered necessary as a result of the reports. The assistant prosecutor offered to produce "every one" of the persons who made them at a place convenient for defense counsel so that he could interrogate them privately and without limitation. Mr. Brown declined the offer and advised the court it was impossible to say how much time would be required to do

what ought to be done or might develop to be necessary once his investigation had begun. He felt the defense had been prejudiced by the State's disregard of the discovery order, and the prejudice could not be removed by an attempt to do a hasty job of investigating, preparing for and meeting the information revealed by the withheld reports.

Although it is probable that the persons making the reports and the other persons mentioned therein were accessible and many of them known to defense (such as Pinkerton agents, defendant's attorneys, Farmer's company engineer and others who visited him at the hospital), and probably available for interview on short notice, and others such as police officers and prosecutor's representatives could have been produced quickly for interrogation, it cannot be said in fairness or with any degree of certainty that forcing a recess and such a course of hasty preparation upon the defense would have been consistent with the due administration of justice. The trial judge, who was fully acquainted with all the facts and circumstances, felt it would be unfair to defendant to push him into a trial recess and an immediate investigation, and that his interests required a more protective course of action. He indicated a feeling also that to continue the trial, requiring defendant to meet as best he could the material covered by the police reports, would probably result in a reversal on appeal if defendant were convicted. On the other hand, since the information contained in the reports was of great importance to the State, particularly on the issue of sanity, to grant defendant's motion to suppress them and any evidence flowing from them would prevent a meaningful trial and probably result in a judgment of acquittal at the close of the prosecution's case or in a jury verdict of acquittal.

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Inquiry by the court for the parties' views about a mistrial revealed opposition by the State. Likewise, the defendant, who had insisted earlier that he wanted a mistrial if the reports were not furnished to him before the trial proceeded any further, now having received and examined them, opposed a mistrial, as well as the proposed recess to permit investigation, and continued to press his motion to suppress them. After a recess, the judge declared he was satisfied the failure of the State to submit the reports to the defendant was the result of a misinterpretation of the discovery order and not a deliberate attempt to deny defendant the information contained therein. He went on to announce his conviction (1) that it would not be practical to recess the trial to permit time for investigation of the reports and preparation by the defendant to meet them, (2) that to strike the evidence revealed by them would prevent a "meaningful trial," and (3) that to allow the case to proceed without excluding that evidence would be "completely unfair to the defendant. Accordingly, over objection of both defendant and the State he was "reluctantly" declaring a mistrial.

A few weeks later defendant moved for a dismissal of the indictment on the ground that a new trial would place him in double jeopardy in violation of the Fifth Amendment to the *United States Constitution*, and of Article I, paragraph 11 of the *New Jersey Constitution*. The motion was denied in a written opinion in which the trial judge reiterated his belief that the prosecutor had acted in good faith in interpreting the discovery order. He declared further that, even though the prosecutor's interpretation was erroneous and must be regarded as the producing cause of the mistrial, under all the circumstances of the case it would not be fundamentally unfair to require retrial of the defendant.

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I

[2] One of the most basic rights possessed by the people of this State and of the United States is freedom from being put in jeopardy a second time for the same criminal offense. *State* v. *Roller*, 29 N. J. 339 (1959). This principle, which grew into the common law and became rooted in tradition and conscience, was embodied in our *Constitutions of* 1844, Art. I, par. 10, and of 1947, Art. I, par. 11. Both paragraphs prohibit the trial of a person after acquittal for the same offense. The Fifth Amendment to the United States Constitution expresses the common law prohibition in more general terms, *i.e.*, "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." In the light of historical evolution and treatment, the difference in language in the context of the present case is without distinction in meaning. The clauses are coextensive in application. *State* v. *Wolf*, 46 N. J. 301 (1966); *State* v. *Williams*, 30 N. J. 105 (1959).

[3, 4] The State contended and the trial court agreed, citing *Brock* v. *State of North Carolina*, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456 (1952), that the double jeopardy provision of the Fifth Amendment applies only to the Federal government and operates on criminal prosecutions within that sphere alone. Assuming the contention were correct it would be of no particular significance. As we have said, the provisions of the two Constitutions, State and Federal, noted above, are coextensive in principle and scope, and so the views of the United States Supreme Court on double jeopardy, even if not controlling, would be influential and persuasive. *State* v. *Williams*, *supra*, 30 N. J. at p. 122. Moreover, much water has passed over

the dam since *Brock* v. *State of North Carolina* and in view of the more recent cases in that Court little doubt remains that the double jeopardy clause of the Fifth Amendment is binding on the States by virtue of the Fourteenth Amendment. See, *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Griffin* v. *State of California*, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), and concurring opinion of Justice Harlan, 380 U. S., at pp. 615-617, 85 S. Ct., at pp. 1233—1234 (1965); *Miranda* v. *State of Arizona*, 384 U. S. 436, 86 S. Ct. 2602, 16 L. Ed. 2d 694, 717 (1966). Although these cases do not involve the double jeopardy clause, they clearly reveal a disposition on the part of the Court to regard protection of all of the basic rights encompassed by the Fifth Amendment as the inescapable obligation of both State and Federal sovereignties.

[5] In order for the defense of double or former jeopardy to be available to an accused, it is not necessary that the previous criminal trial terminate in a verdict of not guilty. The term "acquittal" in our Constitution has a much broader significance. Under well-established principles, jeopardy attaches to a defendant when he is put on trial in a court of competent jurisdiction upon a valid indictment and a jury is empaneled and sworn to determine the issue of his guilt or innocence of the crime charged. Thereafter, ordinarily, he is entitled to have the trial proceed to its normal conclusion, *i.e.*, judgment by the court or verdict of the jury. If the jury is discharged before that time without his consent or without legal justification, the abortive ending is equivalent to acquittal and bars retrial. *State* v. *Romeo*, 43 N. J. 188 (1964); *State* v. *Williams*, *supra*; *State* v. *Locklear*, 16 N. J. 232 (1954).

[6] The requirement for completion of a trial once begun is not an inexorable one, admitting of no qualifications or exceptions. The rule against double jeopardy does not signify that every time a defendant is put on trial before an appropriate court he is entitled to go free if the trial falls short of final judgment. Such a doctrine, the United States Supreme Court said in *Wade* v. *Hunter,* 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949), would create an insuperable obstacle to the administration of justice in many cases where there is no semblance of the oppressive practices at which the double jeopardy provision is aimed. It was recognized there that in some unusual instances a defendant's right to have his trial completed by a particular tribunal must be subordinated to the public interest in fair trials designed to end in just judgments. 336 U. S. at pp. 688-689, 69 S. Ct., at pp. 836-837. In *Wade* the Court quoted as follows from *United States* v. *Perez,* 22 U. S. (9 *Wheat.*) 579, 580, 6 L. Ed. 165, decided in 1824, which has been regarded ever since as establishing the test for determining whether an early termination justifies a plea of double jeopardy:

> "* * * We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvi-

> ous causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. * * *'' 336 U. S., at pp. 689-690, 69 S. Ct., at p. 837.

[7, 8] In succeeding years since *Perez,* the rubric of "manifest necessity," by which the exercise of a trial judge's discretion in granting a mistrial without defendant's consent was to be tested, has been expressed in varied ways. Discontinuance of a trial is proper if under the circumstances the "ends of justice will be best served" thereby; if "[j]ustice to either or both parties [indicates] to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury." *Brock* v. *State of North Carolina, supra,* 344 U. S., at p. 427, 73 S. Ct., at p. 351; if the circumstances satisfy the dispassionate judgment of the trial judge that an "urgent necessity" exists for a mistrial and the ends of public justice will be accommodated; *Wade* v. *Hunter, supra,* 336 U. S., at pp. 690-691, 69 S. Ct., at pp. 837-838; if the circumstances convince his sensitive and experienced judgment that an "imperious necessity" for discontinuing the trial has come into being; *Downum* v. *United States,* 372 U. S. 734, 736, 83 S. Ct. 1033, 10 L. Ed. 2d 100, 102 (1963); if the circumstances create an "absolute or an overriding necessity" or "sufficient legal reason" for the mistrial; *State* v. *Locklear, supra,* 16 N. J., at p. 243. The

important and relevant conclusion to be drawn from the cases is that no hard and fast or mechanistically applied rule exists which compels a finding of double jeopardy whenever a criminal trial in progress is discontinued, or which suggests that every time such a trial begins, the defendant is entitled to go free if the trial does not end in a final judgment. *Gori* v. *United States*, 367 U. S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961). A wide range of discretion is recognized in the trial judge, who has his finger on the pulse of the proceedings. If in his judgment emergent conditions come into being which persuade him that the ends of justice for the defendant and the State cannot be achieved without aborting the trial, neither the Federal nor the State Constitution proscribes such an order. This is particularly true where the circumstances which to him compel the order do not bespeak bad faith or oppressive conduct by the prosecution or a desire or effort to improve the chances of conviction at a subsequent trial. See *United States* v. *Tateo*, 377 U. S. 463, 468, fn. 3, 84 S. Ct. 1587, 12 L. Ed. 2d 448, 452 (1964). In this sensitive area appellate courts must realize that under our system the conduct of a trial is committed to the trial judge, and that in appraising the exercise of his discretionary action a wise and tolerant restraint must be practiced if the separate levels of the judicial process are to be maintained. And appellate reluctance to interfere with a *sua sponte* declaration of a mistrial should be even more pronounced where it is plain that a primary motive for the trial judge's course was solicitude for the defendant's interests. *Gori* v. *United States, supra; Scott* v. *United States*, 91 U. S. App. D. C. 232, 202 F. 2d 354 (D. C. Cir. 1952); *United States* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937).

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Obviously there can be no cataloguing of events or conduct which, without more, will require a holding of double jeopardy when a mistrial is ordered without the defendant's consent. The circumstances must be examined with a mind conscious of the trial milieu and the fact that its atmosphere, vagaries, emotional stimuli and urgency of decision only rarely can be captured in a cold appellate record. They must be looked at also with an awareness that a person accused of crime has no natural constitutional right to be exempted from those procedural practices which are deemed necessary in the effort of the State to make sure that the conduct and final result of a trial shall be in accordance with law and justice to all defendants and to the public.

As we have already noted, the order in this case by its terms authorized a further intrusion into the prosecutor's file than had been permitted previously in New Jersey. It was contrary to pre-existing case law as well as to the specific limitation of R.R. 3:5-11. In fact, we are aware of no jurisdiction where such broad discovery has been sanctioned. See, *Louisell, Criminal Discovery: Dilemma Real or Apparent*, 49 Cal. L. Rev. 56 (1961). Moreover, it may be said with some sheepishness that the practically unlimited scope of the order was not made the subject of oral or written argument on the application for leave to appeal therefrom. As indicated later in *State v. Tate, supra*, 47 N. J., at p. 355, the direction of the argument was toward achieving accessibility to grand jury testimony and statements taken by the police from persons other than the defendant which would aid him in "reconstructing the criminal event." It is likewise fair to say on the basis of the record at that time that no one was thinking in terms

or post-event reports of police guards at the hospital concerning defendant's conduct there, unrelated to the circumstances surrounding the shooting. But, be that as it may, the prosecutor consented to the *form* of the order as prepared by defense counsel without seeking specificity, and must be considered bound by it. This is said, not in criticism of defense counsel, nor to excuse the State's misinterpretation, but by way of understanding the prosecutor's limited compliance. Prior to trial the prosecutor read the order in light of what he believed to be its intended extension of existing case law and rule of practice. The trial court found that in doing so he acted in good faith and we accept that finding. At the trial, defense counsel read the order in light of the compass of its language. He was entitled to do so, and the trial court was correct in accepting his construction.

[9] The problem caused by the State's good faith error came after the jury had been selected and sworn, but it arose on the morning of the first day devoted to the presentation of evidence. Two police witnesses had testified and a third officer was on the stand. Up to this point the testimony had been largely introductory. Once the trial judge concluded that the State's limited view of the discovery order was incorrect, and the defendant was therefore entitled to the substantial number of papers which had not been delivered, he was faced with a dilemma requiring resolution of certain alternatives: (1) If the assistant prosecutor declined to turn over the reports before the trial proceeded further with the introduction of proof, defense counsel would have pressed his motion for a mistrial. Obviously both the court and the State wanted to avoid such a result if possible, and so the recess was taken to

permit the delivery. (2) When this had been done and the trial resumed, defendant no longer spoke in terms of a mistrial; undoubtedly if the motion had been pursued, denial thereof would have been error. Instead he demanded suppression of the reports. A further recess could have been ordered for a time fixed to enable defendant to investigate and prepare to meet the additional evidence. The court believed this course to be impractical and unfair to the defendant (particularly since the jury was sequestered) because it could not be estimated with any degree of probability what time would be required reasonably for the purpose. Assuming we felt, in view of the nature of the information in the reports, that a recess for a reasonable period was worthy of a try, we would refrain from expressing such an opinion now, for to do so would be an unwise invasion of the wide scope of discretion intrusted to the trial judge. (3) Since defendant opposed a recess for investigation purposes, the could could have denied his motion to suppress the reports and directed the trial to proceed, thus requiring the defendant to meet the proof as best he could. This action would have been egregiously unfair to defendant. If conviction followed, reversal on appeal would be virtually certain. Compare, *Logan* v. *United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892). (4) If the motion to suppress the reports and the proof emanating from them were granted, in the face of the State's intention to rely on lay testimony (*i. e.*, that of the hospital guards) to overcome the claim of insanity at the time of the shooting, an acquittal would almost certainly result. After full argument and considerable deliberation, the experienced trial judge concluded that the only reasonable solution fair to the defendant and to the State would be to discontinue the trial and set the case down

for retrial after such interval as would permit the defendant to study and investigate the withheld reports. We are satisfied from our examination of all the facts and circumstances that his reluctant declaration of a mistrial constituted a reasonable exercise of judicial discretion, and that it represented the most sensible balancing of the interests of the defendant and the public. We have no doubt it came from a conscience acutely aware not only of the sacredness of the life at stake before him, but also of the sacredness of the life that was taken.

[10, 11] As we have noted above, the double jeopardy protection does not mean that once an accused has been put on trial regularly, the proceeding must run its ordinary course to judgment of conviction or acquittal. The rule does not operate so mechanistically. If some unexpected, untoward and undesigned incident or circumstance arises which does not bespeak bad faith, inexcusable neglect or inadvertence or oppressive conduct on the part of the State, but which in the considered judgment of the trial court creates an urgent need to discontinue the trial in order to safeguard the defendant against real or apparent prejudice stemming therefrom, the Federal and State Constitutions do not stand in the way of declaration of a mistrial. And this is true even if the conscientious act of the trial judge may be characterized as the product of "extreme solicitude" or "overeager solicitude" for the accused. See, *Gori* v. *United States, supra*, 367 U. S.; at p. 367, 81 S. Ct., at p. 1525. Moreover, if an incident or circumstance of that nature moves the court to order a mistrial not only to safeguard the right of the defendant to a full and fair trial, but also to protect the right of society to have its trial processes applied fully and fairly in the due adminis-

tration of the criminal law, there is even less basis for a claim of trespass upon the privilege against double jeopardy. See, *A. L. I. Proposed Official Draft, Model Penal Code* (1962) §1.08. Clearly the societal right to have the accused tried and punished if found guilty stands side by side with the right of the accused to be prosecuted fairly and not oppressively. While the public right, when it must be considered alone, may not weigh as heavily in the scale as that of the defendant because of the constitutional dimensions of the privilege against double jeopardy and the superior capacity of the State to investigate and prepare for prosecutions, nevertheless when exercise of the trial court's discretion may fairly be said to serve both interests, there is certainly less substantial reason to question its propriety.

There can be no doubt that the primary motive for the mistrial here was a sincere effort on the court's part to protect and assist Farmer. Clearly that purpose has been served because with possession of the police reports and the information given to him in the *voir dire* examination of the prospective jurors at the two abortive trials as to the means by which the State expects to meet the defense of insanity, he was full knowledge of the strength and weakness of the case against him, and ample opportunity to prepare for it. *Cf. United State* v. *Gori*, 282 F. 2d 43, 48 (2 Cir. 1960), affirmed 367 U. S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901. On the other hand, there is no suggestion that the State acted as it did to foster a mistrial and thus in some way to improve its position. The public was benefited only by being allowed to retain its right to go to trial again without loss of what appears to be its only evidence in opposition to the claim of insanity. To equate the mistrial with an acquittal is to vest defendants in cases

like this with a veto power over such action by trial judges and to deprive judges of a measure of discretion which has been a traditional and essential component of courtroom control.

If the court had not construed the discovery order as requiring delivery of the police reports to defendant and the trial had proceeded to a conviction, undoubtedly a reversal would have ensued on appeal. If after receiving the reports defendant had been directed to continue at once with the trial, and he had been convicted, it is virtually certain that the same result would have followed on appeal. In this event a new trial would be ordered, and a claim of double jeopardy would be without merit. It would be anomalous, therefore, to hold that when the defendant declines the State's offer of recess and the production of the witnesses making the report for his *in camera* interrogation, and declines also an offer of recess to permit any investigation made necessary by the reports, and insists on suppression of the reports and any evidence flowing therefrom, which means emasculation of an essential part of the State's case, the only choices open to the court are (1) to incur the likelihood of reversible error by proceeding, (2) to make an acquittal inevitable, or (3) to order a mistrial which will bring into operation the double jeopardy bar against retrial. Such a ruling would mean that, in spite of this kind of good faith error on the part of a representative of the State, and a conscientious effort by the court to protect the defendant against possible prejudicial consequences of the error, command of the situation passes to the defendant and he can either force the court to commit reversible error or, by means of asserted opposition to a mistrial, in effect confer immunity upon himself if

the mistrial is granted. That indeed would be a high price to require society to pay for a good faith mistake of a prosecutor and an honest effort by a court to safeguard the defendant and the public from its consequences.

If a mistrial of the nature now before us were to be equated with an acquittal, the psychological impact on trial judges would probably motivate them against such action in the future unless the defendant requests it or consents to it. If the defendant does not so move or give his consent, the judges may consider it preferable to allow the trial to run its course to the probably reversible conclusion and permissible retrial, rather than to immunize the defendant by ordering a mistrial. See Note, "Double Jeopardy: The Reprosecution Problem," 77 Har. L. Rev. 1272, 1279-1281 (1964). This would be an understandable (though neither a healthy nor desirable) result. Obviously a defendant is no less wronged by a finding of guilt after an unfair trial than by a mistrial order opposed by the State and the defendant and not made necessary by an intentional effort by the prosecutor to obtain an unfair and oppressive advantage, but conscientiously believed necessary by the trial judge to protect both the defendant's and the public's interest. A distinction between the two "affords no sensible basis for differentiation with regard to retrial." *United States* v. *Tateo*, *supra*, 377 U. S., at p. 467, 84 S. Ct., at p. 1589. Judicial inaction at the trial level, whether through a felt impotence or even excessive caution, in the face of a plain need to meet a trial challenge such as was presented here would probably do the administration of criminal justice more harm than the granting of a mistrial.

Since there is no over-all formula, no hard and fast rule for determining when an order of mistrial will cause the

jeopardy bar to spring into being, each case must depend upon its own facts and the urgency of its circumstances. And as might be expected, therefore, no case has been cited to us which presented to the trial court an emergent situation like this one.

In *Wade* v. *Hunter, supra,* Wade, an American soldier with the combat forces in Germany in World War II, was charged with rape. When he was put to court martial trial, the troops had advanced a considerable distance from the scene of the crime. Nevertheless the trial proceeded, the evidence was heard, arguments of counsel made, and the court martial closed to consider the case. Later the same day the trial was reopened and an announcement made that it would be continued until a later date in order to hear some additional witnesses. A week later the Commanding General withdrew the charges from the court martial, directing it to take no further proceedings. The General then transmitted the charges to the Commanding General of the Third Army, recommending trial by a new court martial. The reason given was that two witnesses, father and mother of the rape victim, were unable to be present because of illness, and the trial had been continued so their testimony could be taken. The General noted also that, because of the "tactical situation" of his command and its considerable distance from the residence of the witnesses, the court martial could not be completed within a reasonable time. The Third Army General, finding his tactical situation to be similar, in turn forwarded the matter to the Commanding General of the Fifteenth Army, who convened the court martial. At this time Wade pleaded that he could not be tried again as he had been put in jeopardy by the first court martial. The plea was denied, and after his conviction the matter ultimately reached the United States Supreme Court.

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In rejecting the defense, Justice Black, writing for the Court, declared that the double jeopardy provision of the Fifth Amendment does not mean that every time a defendant is put to trial in a proper court he must go free if the proceeding fails to end in a final judgment. "Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." 336 U. S., at pp. 688-689, 69 S. Ct., at p. 837. It was said further that a defendant's right to have the trial go to final judgment must on occasion be subordinated to the "public's interest in fair trials designed to end in just judgments"; and that a rigid rule banning discontinuance of a trial because of absence of witnesses, come what may, was not acceptable. Such a rule would be inconsistent with the guiding principles of *United States* v. *Perez, supra*, "to which we adhere," namely that whether justice requires discontinuance of a particular trial should be decided by "persons conversant with factors relevant to the determination." 336 U. S., at p. 689, 69 S. Ct., at p. 837. It is obvious that the Court was referring to trial judges, and reiterating the view of *Perez*, "[which] has been the basis for all later decisions [of the Supreme Court] on double jeopardy," *i. e.*, that such judges have the right to order a mistrial when, in the conscientious exercise of their discretion, particular circumstances manifest a necessity for so doing and failure to do so would defeat the ends of justice. 336 U. S., at p. 690, 69 S. Ct., at p. 838. See also, *Lovato* v. *State of New Mexico*, 242 U. S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916); *Brock* v. *State of North Carolina*, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456 (1952), decided in terms of the Fourteenth Amendment; *United States* v. *Tateo*, 377 U. S.

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463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964); *United States* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937); *Scott* v. *United States*, 91 U. S. App. D. C. 232, 202 F. 2d 354 (D. C. Cir. 1952).

The two most recent cases in the United States Supreme Court are *Gori* v. *United States*, 367 U. S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961) and *Downum* v. *United States*, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). Gori had been indicted for knowingly receiving goods stolen in interstate commerce. A jury was impaneled and government evidence was introduced throughout the morning and was continuing in the afternoon when a situation arose which in the trial judge's opinion required a mistrial. The case was retried later over defendant's double jeopardy objection and he was convicted. The conviction was sustained in the Court of Appeals for the Second Circuit, 282 F. 2d 43 (1960), and by the United States Supreme Court.

The incident which provoked the mistrial was not very clear from the record. Apparently, while one of the prosecution witnesse was being questioned on direct examination, the trial court got the impression that the government attorney was endeavoring to insinuate to the jury that the defendant had been convicted of other crimes. 282 F. 2d, at p. 46. Actually no such question was put specifically, nor did the cold appellate record reveal clearly that such was the intention of the United States attorney. The parties agreed, however, that the mistrial was declared pursuant to the trial judge's intention to prevent evidence of other crimes by the accused. The Court of Appeals observed that the trial court should not have acted so hastily, but should have awaited a definite question which would have permitted

a clear-cut ruling. Judge Clark pointed out that the Federal system takes pride in the fact that its judges are not mere automatons or referees, but bear an affirmative responsibility for the proper conduct of a criminal trial. And he indicated that, even though it may appear in a rare case that a judge in ordering a mistrial may have been overzealous in his protection of the rights of an accused, the law is better served by continued acceptance of the constitutional propriety of a conscientious exercise of his discretion in declaring a mistrial.

The Court concluded with a statement pertinent to the present case:

> "Here, the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trial for essentially the same offense. On the other hand, for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future." 282 F. 2d, at p. 48.

On *certiorari* the United States Supreme Court affirmed. The majority opinion described the case as one in which,

viewing it most favorably to the accused, the mistrial order "was found neither apparently justified nor clearly erroneous" by the Court of Appeals. Reference was made to the necessarily wide range of discretion which is and must continue to be vested in trial judges in this area of trial practice. It was said also that "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." 367 U. S., at p. 368, 81 S. Ct., at p. 1526. Finally the Court indicated that error of constitutional dimensions could not be found on the record presented; it "would not thus make [trial judges] unduly hestitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." 367 U. S., at p. 369, 81 S. Ct., at p. 1527.

In *Downum* v. *United States, supra,* the Court reached the opposite conclusion as to the effect of a mistrial, but in a different factual setting. Downum had been charged in six counts of an indictment with forging and passing government checks, and with conspiring with two codefendants (who pleaded guilty) to commit those acts. During the week previous to the mistrial, 12 cases, including Downum's, were set for trial the following Monday. The trial judge commented later that this was "very short notice." The cases involved about 100 witnesses, and subpoenas had been issued to the marshal for service. The Downum case was number 10 on the list, and the prosecutor did not expect it to be reached on Monday or Tuesday. On Monday afternoon the marshal advised the prosecutor he had learned

that the wife of the key witness on two of the counts in the indictments would inform them of her husband's whereabouts "if she should learn it." When Downum was called on Tuesday morning, the prosecutor, who was then trying another case, marked it ready without ascertaining from the marshal whether the particular witness was in court. A jury was selected and then excused until 2:00 p.m. so the prosecutor could complete the case on trial. Upon checking with the marshal's office during the noon recess, the prosecutor learned the witness was not present. He immediately informed the judge in chambers, and at the opening of the afternoon session defense counsel was advised of the missing witness and that the case would have to go over for a few days. Defendant thereupon moved to dismiss the two counts of the indictment involving that witness for lack of prosecution, and to require the trial to proceed on the remaining counts. The trial court denied the motion, and discharged the jury over the defense objection.

Two days later the case was called again and the defendant pleaded double jeopardy. The plea was rejected, the trial proceeded and resulted in a conviction on all counts involving Downum. The Court of Appeals for the Fifth Circuit agreed that the first abortive proceeding, at which nothing was done beyond selection and swearing of the jury, did not justify application of the Fifth Amendment to bar the later completed trial. It held the trial court had not abused its discretion under the circumstances in ordering the mistrial. 309 F. 2d 137 (5 Cir. 1962).

On *certiorari*, the United States Supreme Court reversed by a five-to-four vote. It took the view that the situation was simply one where the prosecutor had entered upon the trial of the case without sufficient evidence to convict. At the

end of a short opinion Justice Douglas said tersely that any doubt as to what rule should be applied in such a situation would be resolved by the majority "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." 372 U. S., at p 738, 83 S. Ct., at p. 1035. We do not take this language in its context to signifiy an intention to deny in the future the existence of any judicial discretion to grant a mistrial during the course of a criminal trial.

This decision apparently represents the first time since the adoption of the Federal Constitution that the United States Supreme Court interfered with the determination of a trial court that justice required a mistrial, and held that in granting the mistrial it had abused its discretion. (See Note, "Double Jeopardy, The Reprosecution Problem." *supra,* 77 *Har. L. Rev.,* at p. 1277). The result is the most extreme recorded example of application of the double jeopardy bar that has been brought to our attention, and raises considerable question as to the extent to which it has drawn in the long recognized perimeter of the trial judge's discretionary control over the conduct of criminal trials. In any event, the case is probably a binding precedent on this Court and we accept our obligation to follow it in the same or indistinguishable fact pattern. It may be noted, however, that *Downum* did not criticize or overrule *Gori* v. *United States;* moreover, it adhered to the principle that in deciding whether the jeopardy bar is to be applied, each case must turn on its own facts. 372 U. S., at p. 737, 83 S. Ct., at p. 1035.

The present case is distinguishable from *Downum,* and brings facts to us which, in our judgment, are even more influential against application of the double jeopardy doc-

trine than those in *Gori*. Or, put in terms commonly found in the cases, the unusual facts and circumstances here clearly provided a reasonable basis for the trial judge to conclude that an urgent need existed to abort the trial in the interest of the defendant and the State. As we have already explained, the unusual and novel discovery order must be considered in the ambiance of its time. The prosecutor's interpretation of it was too narrow when measured by its language. His construction, however, found as it was by the trial court to have been made in good faith, though erroneous, was not without some basis in reason when related to the arguments of the parties to the various courts which considered the discovery motion. The arguments dealt almost exclusively with the desirability of extending the established scope of discovery to the statements of witnesses other than the accused in order to enable him to reconstruct the criminal event. That the prosecutor believed this was the purport of the order is indicated by the delivery months before the trial began, of the entire 274-page transcript of the grand jury testimony covering circumstances preceding, surrounding and immediately after the homicide incident. It is shown also by the delivery at the same time of the comprehensive statements obtained from the persons who appeared before the grand jury, as well as notes of interviews with six other persons who shed light on the relations between Farmer and his wife prior to the shooting. When at the early stage of the trial the court decided there had been incomplete compliance with the discovery directive, it is plain that the principal deficiency was considered to be the failure to turn over the reports of the police officers who had guarded Farmer's hospital room for days after the homicide. This was because the testimony derived from those reports represented in large

part the basis upon which the State expected to rebut the defense of insanity. Although satisfied that the prosecutor had acted in good faith, the trial court felt in all good conscience that it would "be completely unfair" to the defendant to force him to proceed with the trial without giving him an opportunity to investigate and prepare to meet this lay proof of sanity. Also in view of the good faith determination, the court felt it would be transgressive of the public interest to suppress the testimony and thus in all probability produce an acquittal. The dilemma facing him was aggravated by the awareness that to force defendant to continue the trial and meet the lay rebuttal testimony as best he could would result in virtually certain reversal, if conviction ensued. The pressure of all the circumstances led him to conclude that mistrial was the only just solution for the defendant and the public. That solution, born of the unusual trial travail, should not be considered so unreasonable by a reviewing court as to constitute an abuse of discretion.

In short, here, as in *Gori*, the defendant has not suffered any substantial prejudice because of the mistrial. He now has foreknowledge of the substance of the State's case against him, and ample time to prepare to meet it. Moreover, as the trial court found, the mistrial was not caused by any intention of the prosecution to take an undue advantage, or to oppress Farmer in his effort to defend himself.

Accordingly, the interlocutory order of the trial court rejecting the defense of double jeopardy is affirmed, and the cause may be listed for trial.

For affirmance—Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR, SCHETTINO and HANEMAN—6.

For reversal—None.

APPENDIX C

(Mandate on Affirmance)

(Filed—November 21, 1966)

SUPREME COURT OF NEW JERSEY

APPEAL DOCKET No. 5171

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

CHARLES FARMER,

Defendant-Appellant.

This cause having been duly argued before this Court by Mr. Raymond A. Brown, counsel for the appellant and Mr. John P. Kosak, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Middlesex County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Middlesex County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 21st day of November, 1966.

MORTIMER S. NEWMAN, JR.
Acting Clerk of the Supreme Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1071

CHARLES FARMER,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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for EDWARD J. DOLAN,
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JOHN P. KOZAK,
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On the Brief.

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Article 1, Section 11 5

The respondent, The State of New Jersey, presents herewith its answer to the petitioner's application for a writ of certiorari to review the judgment of the Supreme Court of New Jersey entered in the above-entitled cause on November 21, 1966.

Counter-Statement of Questions Presented

1. Is the double jeopardy provision of the Fifth Amendment to the Federal Constitution applicable to the several states by way of the Fourteenth Amendment to the Federal Constitution?

2. Was the trial court's declaration of a mistrial for a sufficient legal reason and an absolute or overriding necessity, thereby permitting retrial of the defendant without placing him again in jeopardy?

Counter-Statement of Facts

On September 18th, 1963, Barbara Farmer was shot and killed at her home in Highland Park, New Jersey. Her husband, the defendant herein, was subsequently indicted for the murder. After being adjudged incompetent to stand trial he was committed to the Vroom Building at the New Jersey State Hospital where he remained until May, 1965, when it was judicially determined that he had recovered his competency and was thus fully capable of standing trial.

The defendant now moved for pre-trial discovery on various aspects of the indictment and on August 2, 1965, Middlesex County Court Judge Samuel V. Convery granted the motion in precisely the terms and areas specified in the motion. Among these—and the only one which is presently of any concern—was the mandate that the defendant be allowed "to inspect, copy and photograph all statements, papers and confessions concerned with the within indictment." The State's application for leave to appeal from

Judge Convery's decision was denied by the Supreme Court, *State* v. *Farmer,* 45 N. J. 520, 213 A. 2d 249 (1965) and the State proceeded, in its judgment, to comply fully with Judge Convery's order.

Juror interrogation began on January 4, 1966, but prior to completion a mistrial was declared, with the consent of both parties, because of possible jury contamination. Retrial was scheduled for January 17th, 1966, when jury selection again commenced, the State seeking the death penalty. On January 31, 1966, a full complement of fourteen jurors had been impanelled and actual trial of the merits was scheduled for February 1, 1966.

Prior to the presentation of any witnesses, however, the assistant prosecutor trying the case sought a ruling from Middlesex County Court Judge John B. Molineux, presiding over the trial, as to whether oral statements given by prospective witnesse to representatives of the State fell within the scope of paragraph (a) of Judge Convery's order, set forth at length hereinbefore. Respective counsel took obviously contrary positions and the Court ruled in favor of the State.

On February 3, 1966, Judge Molineux again declared a mistrial. A reasonable summary of the events and reasons which impelled the Court to exercise its discretion in aborting the trial as it did are as follows:

In the course of direct examination of Sgt. Earl F. Eichler of the Highland Park Police Department, the State sought to elicit testimony from him as to an apparently spontaneous comment made by the defendant at the scene of the homicide, while Sgt. Eichler was listening to Douglas Hague, an eyewitness to the shooting, narrating the events as he remembered them. Defendant's counsel objected and asked whether Eichler had a written report reflecting his

testimony, past and projected. The reply was affirmative. A full colloquy and argument then followed, the State informing counsel and the Court that it had in its possession not only Eichler's report but those of many other policemen and other officers, rendered subsequent to the homicide and pursuant to their services as guards during the defendant's confinement at St. Peter's Hospital for treatment of a self-inflicted wound in the shoulder.

Defendant's attorney demanded copies of all such reports, stating that they fell squarely within Judge Convery's pre-trial order for discovery. The State opposed the demand, maintaining that investigative and police reports were not within the scope of the order and that the order contemplated formal statements of persons other than the defendant, taken by members of the prosecutor's staff, and memoranda of oral statements by such other persons, prepared by members of the prosecutor's staff. All of these had been in counsel's hands for a substantial period before trial.

The trial court ruled, however, that the language of the order was so broad as to uphold the defendant's position and directed the State to furnish copies of all written reports made by policemen and other officers. Trial was recessed until the following morning to allow the State time in which to make copies of the reports available.

Mindful of the impact of the court's ruling and, as later conceded, that the language of the order was so broad as to cover, *in the abstract*, every conceivable document in the State's file, the State turned over to counsel every report and memorandum in its file. In effect, the contents were swept clean and made available in order to avoid recurrence of the pending situation.

At this point the respondent deems it important to note that during the voir dire and early on, counsel for the defendant demanded a list of all the State's prospective witnesses. The State resisted this, on the authority of *State* v. *Sullivan,* 33 N. J. Super. 138, 109 A. 2d 430 (App. Div. 1955), but the trial court ordered its production on the theory that prospective jurors might be acquainted with one or more of the witnesses to such an extent as might invoke a challenge for cause and, and the least, a peremptory challenge.

The transcript of the record at the trial will confirm that the names of all the police and sheriff's officers whose testimony was subsequently sought to be suppressed appeared on the list furnished the defendant pursuant to the court's order. This list remained in counsel's hands during the remainder of the time that juror interrogation continued.

On February 2, 1966, defendant's attorney moved to suppress the reports in question and the prospective oral testimony of the officers who had made them, on the ground that the State had deliberately violated Judge Convery's order for discovery and had, in effect, concealed the reports when it was under a direct obligation to reveal them. The State denied these charges and asserted that the most it could be accused of was misinterpretation, since police reports were never mentioned in argument before Judge Convery or before the New Jersey Supreme Court, where the general issue was discussed on the State's application for leave to appeal. Counsel conceded this fact, but nevertheless insisted upon suppression. The Court gave both sides the opportunity to research the law on the subject and recessed the trial to the following day.

After hearing exhaustive argument on February 3, 1966, the trial court concluded: 1) A delay of the trial to permit

the defendant to investigate the reports in question and produce countervailing testimony would not only be impractical but unfair to the defendant, no matter how much time was afforded; 2) the reports and oral testimony would not be suppressed because the court was convinced that the State had acted in good faith and had not deliberately concealed the reports in violation of the discovery order; further, to proceed without this testimony, which would form the very core of the State's case on the issue of sanity, would result in no meaningful trial; 3) under all the circumstances, fairness to both sides and the interests of justice dictated a mistrial, despite the objections of counsel on both sides and the extreme reluctance of the court.

In due course counsel for the defendant moved to dismiss the indictment, citing the double jeopardy provisions of Article 1, Section 11 of the New Jersey Constitution and the 5th Amendment to the Federal Constitution. On April 5, 1966, Judge Molineux filed a letter opinion wherein he denied the motion, ruling that retrial of the defendant would not result in fundamental unfairness to him. The defendant's application for leave to appeal followed, joined in by the State.

The Supreme Court of New Jersey granted leave to appeal, heard oral argument and subsequently affirmed the order of the trial court, holding that the factual circumstances presented did not warrant the invocation of the double jeopardy provisions of either the Federal or State constitutions.

The matter now comes before this Honorable Court on the defendant's petition for a writ of certiorari to the Supreme Court of New Jersey.

ARGUMENT

I.

The respondent is of the opinion that the 5th amendment to the Federal constitution is indeed applicable to the several states by virtue of the 14th amendment to that constitution. Accordingly the respondent joins in and agrees with the petitioners argument under Point I of its petition on the foregoing issue.

II.

The only substantive question before this Court relating to the factual situations faced by the tribunals below is whether the prosecutor's misapprehension as to the scope of a preliminary order for discovery provides sufficient reason for allowance of the petitioner's writ.

As noted by the New Jersey Supreme Court no approximately comparable factual circumstances were available for its guidance and the same is true today.

On the other hand the petitioner asserts that if the events in *Downum* v. *United States,* 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963) warranted this Court's intercession, then its attention is even more urgently required here. Comparison of the two cases does not support that contention.

First, the prosecutor in *Downum requested* mistrial over the defendant's objections. In the cause at bar the prosecutor no more wanted a mistrial than did the petitioner. Even so, in the face of this significant action by the prosecutor in *Downum,* four members of this Court considered that the circumstances which led to the prosecutor's request were such as constituted harmless error. In addition, it was emphasized by the minority that the

trial itself had not actually got under way. Hence, the minority indicated that the prosecutor's and trial court's actions did not go beyond the flexibility so clearly called for by the pronouncements in *United States* v. *Perez,* 9 Wheat. 579, 6 L. Ed. 163 (1824) and *Wade* v. *Hunter,* 336 U. S. 684, 93 L. Ed. 974, 69 S. Ct. 834 (1949).

The majority in *Downum* of course, was of another mind and imposed upon the prosecution the severest of all penalties available, one which, in our judgment, would be untenable here.

Pursuing this thought, our second emphasis is directed to the fact, stressed also by the court below, that the actual trial had only barely commenced. The only testimony heard until the abrupt cessation which followed was purely of a preliminary nature. The prosecution, in other words, had just begun to set the scene and went no further. Accordingly, we consider it fair to say that progress of the trial to that point had not exposed the defendant to anguish of mind and body in any degree greater than that experienced by him during a two-week period of juror interrogation.

The third differentiation which we perceive between *Downum* and this case is referred to in our Counterstatement of Facts, namely, the disclosure to counsel for the petitioner, during interrogation of prospective jurors, of every witness which the State intended to have on call or produce for testimony on both its case in chief and on such rebuttal as would relate to the issue of insanity. Thus, counsel was then on notice, well in advance of impanellment of the jury and the formal presentation of evidence by the State, that the respondent might very well have in its possession reports and statements, rendered by those witnesses, which he later sought to suppress on the

ground that they had been intentionally withheld in violation of the discovery mandate.

At this juncture the respondent can do no better than quote an appropriate connective commentary on the subject by the New Jersey Supreme Court:

> "* * * Yet at no time during the two weeks of jury selection or after the introduction of testimony and exhibits began, until the impasse to be discussed later was reached, does the record reveal that he called this fact to the attention of the judge or made a motion that their statements, if any, be delivered to him, or that the suggestion was advanced that such statements were within of the discovery order * * *". (Appendix B, pp. 16a and 17a)

Candor requires the concession that this point was not raised before the trial court on the motion, post-mistrial, to dismiss the indictments on the ground of double jeopardy. It was, however, urged before the New Jersey Supreme Court. Its acceptance, therefore, established in the collctive mind of one unanimous reviewing court that the mistrial was not solely the respondent's fault. While there is a manifest obligation on the part of a prosecuting authority to conduct itself so as to avoid abortive termination of a criminal trial, a corresponding duty must perforce impose itself upon a defendant and counsel.

Thus, taking into consideration all the material facts, both active and passive, including the prosecution's unassailable protestation that its nondisclosure was not designed or wilfull, it should be clear that the mistrial was the creature of both the respondent and petitioner. In the case of the former, honest misinterpretation of a discovery order, viewed in the light of applicable New Jersey

decisional law, was the propellant; as to the petitioner, passivity in the face of information which commanded inquiry, was the cause. If this be accepted as declarative of the true situation, it does not allow for separation and focus on the prosecution as the sole producing agent of the mistrial.

The respondent finds it somewhat curious that the petitioner should cite *United States* v. *Tateo,* 277 U. S. 467, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964), even though it be only for the purpose of stressing this Court's distinction of *Downum* from *Tateo.* We say this because the facts in *Tateo,* in our judgment at least, would appear to lean toward the defendant in that case; and yet this Court found, albeit by a split decision, that retrial there would not violate the Fifth Amendment's stricture against double jeopardy.

The fundamental distinction between *Tateo* and *Downum* and now *Farmer* is aptly stated by the petitioner, quoting from *Tateo* on page 11 of his petition:

> "* * * There the court held that when a jury is discharged because the prosecution is not ready to go forward with its case, the accused may not then be tried before another jury. * * *".

If the meaning of *Downum* is indeed so confined, the decision has no impact in the present case.

CONCLUSION

The decisional law examined provides no basis for intercession by this Court in this matter, especially in sight of the facts as found by the New Jersey Supreme Court. The respondent respectfully requests, therefore, that the petition for certiorari be denied.

Respectfully submitted,

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